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IN THE

# Supreme Court of The United States

October Term, 1973

No. 73-1717

WALTER E. FRITZ and
RAMONA J. FRITZ,

*Petitioners,*

v.

THE TOWN OF CLERMONT,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

ROBERT W. GEDDES
HAROLD W. JONES

SMITH and JONES
2470 Indiana National Bank Tower
Indianapolis, Indiana 46204

*Counsel for Petitioners*

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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The Petitioners, Walter E. Fritz and Ramona J. Fritz, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in this proceeding on February 19, 1974.

## OPINION BELOW

The opinion of the Court of Appeals of Indiana (App. A of Petition) is reported at 292 NE 2d 258. The Supreme Court of Indiana denied a petition to transfer without opinion.

## JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on February 7, 1973. A timely petition for rehearing was denied on March 21, 1973. The Petition To Transfer to the Supreme Court of Indiana was denied February 19, 1974. This Petition For Certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

## QUESTIONS PRESENTED

*1.* Whether a local assessment against the Petitioners' land was valid for the construction of a sewer which did not confer any special benefits to their land because they were already served by a better, pre-existing sewer, for which they had given valuable consideration.

*2.* Whether the petitioning landowners were deprived of their property without due process of law when the municipality assessed their land without making any determination of benefits to it.

*3.* Whether the state authorities acted arbitrarily in upholding the acts of the municipality in imposing the special assessment upon the Petitioners' land without determining that special benefits would accrue to the land assessed.

## CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment 14, Section I which reads

> ". . . All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

In 1963 the Petitioners acquired a tract of land in the Town of Clermont, Indiana.

In 1967 and early 1968, in exchange and in consideration for an easement, the Indianapolis Sanitary District built an interceptor sewer across the Petitioners' land and granted them rights to several connections adequate to serve all of their land. In April of 1968 the Petitioners made their first hookup to the sewer.

In February of 1968 the Town's governing Board of Trustees called a public meeting to launch the Town's own sewer project. At this meeting the Board resolved to include in the Town sewer project all land within the Town boundaries.

The Petitioners received no notice of this meeting, and did not attend.

In May of 1968 the Town Board convened its second public meeting to determine assessments. The land of the Petitioners was included in the assessment.

The Petitioners received no notice of that meeting, and did not attend.

In the middle of June, 1968 the Petitioners first learned of their assessment when they received a written notice thereof.

The Petitioners paid their assessment—almost $18,000—under protest and attacked the assessment for want of notice. The Indiana Supreme Court found that the assessment was made without legal or actual notice of the hearing to determine assessments and remanded to the Trial Court, which then held the assessment of the Petitioners' tract null and void. *Fritz v. Board of Trustees of Town of Clermont* (1969) 252 NE 2d 567.

On January 20, 1970—after the Trial Court had voided the assessment of the Petitioners' land—the Town, upon personal notice to the Petitioners, convened a meeting to hear the Petitioners' remonstrance. By that time, the Town sewer had been completed. The remonstrance explicitly protested the assessment on the basis that the pre-existing sewer across the Petitioners' land was adequate and therefore the Town sewer did not benefit them or their land within the meaning of the law.

After the reading of the remonstrance, the Town attorney advised the Board that it could rescind, modify or confirm the prior void assessment. The Board voted to confirm the prior assessment—to the exact penny. The minutes do not show any Board discussion before this vote. No other citizen of the Town was admitted to the hearing.

Before voting, the Board had full knowledge of the pre-existence and location of the Indianapolis Sanitary District interceptor sewer crossing the Petitioners' land, and also had full knowledge that the Petitioners had hooked

up to the interceptor sewer 21 months earlier and were being adequately served thereby.

The respondent Town's assessment of each tract and parcel within its boundaries had been reached by multiplying the square footage of each by a constant factor. The Town Board had failed to exclude the Petitioners' land from its assessment although knowing that the Petitioners' land was already being served by the pre-existing sewer. And the Town Board in its January 20, 1970 "hearing" simply "confirmed" its original void assessment of the Petitioners' land without reaching any determination of benefits or the exclusion of the Petitioners' land.

Only a small minority of the town's property owners had connection rights to the pre-existing interceptor sewer.

On January 27, 1970 the Petitioners filed their complaint in the County Court setting forth the facts summarized above and requesting that the assessment be declared null and void. The Petitioners specifically pointed out that their land did not receive any special benefits from the Town sewer and that their land should have been excluded from the local assessment.

Both sides produced witnesses. No witness testified that benefits would accrue to the Petitioners' land. On the other hand the Petitioner Fritz and the Indianapolis Sanitary District representative, Harlan Moore, testified that no benefits would accrue to the Petitioners' land. The testimony showed that the Town never made any determination of benefits as to the Petitioners' land.

The County Court affirmed the Town assessment. The Petitioners thereafter filed a Motion To Correct Errors setting forth various errors of law including the charge

that the Town's acts were arbitrary and the Petitioners' rights under the 14th Amendment of the U. S. Constituion were being violated.

The Motion To Correct Errors was denied and the Petitioners appealed to the Court of Appeals of Indiana. There, they assigned the same errors. The Court of Appeals affirmed the lower Court and a timely Petition For Rehearing was denied. A Petition To Transfer To The Supreme Court of Indiana was also denied, without opinion.

## SUMMARY OF ARGUMENT

The Petitioners had a pre-existing sewer adequately serving all of their land, and they had no use for the additional Town sewer subsequently constructed. The Town knew that fact. Therefore, the Petitioners' tract should have been excluded from the tracts and parcels assessed for the Town sewer.

Nevertheless, the Town Board included their tract among those assessed, but made no determination of benefits to it. The truth is, no benefits accrued to their tract.

In failing to exclude the land of the Petitioners, and also in imposing the assessment upon their land without determining benefits to that land, the respondent Town acted arbitrarily and capriciously; and deprived the Petitioners of their property without due process of law and just compensation.

a burden, or make it especially adapted to a purpose which enhances its value.

"'. . . it is not necessary that the benefits be direct and immediate to justify an assessment. Future possibilities, if any, as well as collateral or indirect benefits, may be considered.' 10 I.L.E., Ditches and Drains, pp. 503, 504. *Cleveland, C., C. & St.L.Ry. Co. v. Mumford* (1935), 208 Ind. 655, 197 N.E. 826; *Watson v. Armstrong* (1913), 180 Ind. 49, 102 N.E. 273; * * *."

A thorough search of the record before us reveals no evidence that the special benefits flowing to the land of appellants are less than the amount assessed. Appellants merely argue that the failure of the Board to consider the effect of the pre-existing sanitary sewer makes the assessment contrary to law. Admittedly, the fact that a parcel of land is receiving sewer service from another source emits an inference that the special benefits to the parcel *may* be less than the benefits flowing to other parcels of land. However, that inference, standing alone, does not show that the improvement does not invoke special benefits on the property in question in an amount equal to, or in excess of, the assessment.

While this is a case of first impression in Indiana, the case of *Brewster-Mill Park Rlty. v. Town Bd. of North Elba* (1962), 17 A.D. 2d 467, 235 N.Y.S. 2d 931, is factually similar. In that case the Town of North Elba attempted to construct a sewer district designated as the Fawn-Ridge Sewer District which included the restaurant of the appellants. The restaurant had been served for a number of years by a main trunk sewer line of another sewer district which passed under the restaurant en route to the disposal facilities. The trial court, in effect, held that the restaurant was not benefited by the proposed improvement. In revers-

ing the judgment of the trial court the reviewing court, at 932-933 of 235 N.Y.S. 2d, stated:

> " 'Whether or not a particular parcel of land has been benefited by a particular improvement is ordinarily a question of fact. The test is not whether as now used by its present owner any advantage is received, but whether its general value has been enhanced. [Citing authorities.] Unless we can say as a matter of law that the improvement may not by any possibility increase the value of respondent's property we must accede to the determination of the Town Board * * *.'
>
> * * * * *
>
> "The fact that respondent already has privately arranged to provide itself with adequate facilities is not controlling." [Citing authorities.]

The evidence contained in the record before us is uncontroverted that the area assessment against the property of Walter E. Fritz and Ramona J. Fritz was based only on the result of the multiplication of the amount of square footage within the Fritz' property by a cost per square foot of the entire assessment area. This computation was properly considered the primary assessment against the Fritz' land. Section 48-3958, *supra*.

It is not the function of this court to weigh the evidence and determine the value of the special benefits accruing to the Fritz' property by reason of the improvement. The Fritzes failed to show that their property is not specially benefited in the amounts assessed. In challenging the primary assessment contained in the assessment roll, the burden was upon the Fritzes to show the special benefits to their land were less than the amount assessed. Section 48-3958, *supra*. They failed to satisfy this burden.

In their proposition four, appellants contend that their land should have been excluded from the assessment area.

The determination of whether the boundaries of the proposed assessment area are proper *vel non* is to be made in the hearing conducted pursuant to § 48-3951, *supra*. Our Supreme Court in *Fritz v. Bd. of Trustees, supra,* distinguished between the two types of hearings in proceedings of this character. In the type of hearing prescribed by § 48-3951, *supra,* the court stated that a notice of a general nature to the public in general would seem to suffice. (at 211 of 253 Ind., at 571 of 252 N.E. 2d.)

Here, appellants-Fritzes did not appear to remonstrate against the proposed boundaries of the assessment area. Moreover, where it cannot be said as a matter of law that a special parcel of land is not specially benefited, it cannot be said that the land should have been excluded from the assessment area.

Appellants argue that they were entitled to specific determinations that the special benefits were equal to the amounts assessed.

The terms "special benefits" elude concrete definition. They may only be explained by reference to other anomalous concepts. See: *Indiana v. City of Indianapolis, supra,* and cases there cited. In enacting Acts 1967, ch. 128, the Legislature did not require a dollar and cents determination to be made of the amount of special benefits flowing to each parcel of land. Instead, § 48-3951, *supra,* merely requires a determination that the special benefits to the several parcels of land within the area be equal to the estimated cost of the improvement. Section 48-3958, *supra,* merely requires that the assessment roll shall have *as the special benefit* to each parcel of land the primary assess-

ment against the parcel determined under § 48-3957, *supra*. These provisions were followed by the Board in the instant case.

Finding no reversible error, the judgment of the trial court is affirmed.

Affirmed.

SHARP AND STATON, JJ. CONCUR.

## ARGUMENT

### I

### THE TOWN SEWER DID NOT CONFER A SPECIAL BENEFIT TO THE LAND OF THE PETITIONERS, WHICH WAS ALREADY ADEQUATELY SERVED BY PRE-EXISTING NEW INTERCEPTOR SEWER

When land is included within the boundaries of a municipal drainage district for drainage from which it cannot be benefited, an assessment on this land for a proportionate cost of drainage is a deprivation of property without due process of law. *Myles Salt Co. v. Iberia Drainage Dist.* (1916) 239 U.S. 478.

It bears repeating that the Petitioners had contractual rights to a number of hookups to the Indianapolis Sanitary District interceptor sewer—and that the Petitioners had made their first hookup—before the respondent Town constructed its own sewer.

And there can be no doubt that the Indianapolis Sanitary District's interceptor sewer was completed and adequately serving the land of the Petitioners before the Town made its purported assessment against their land, and before it started construction of the Town sewer.

Of utmost significance is the fact that before "confirming" its prior void assessment of the Petitioners' tract, the Town Board had full knowledge of the adequacy and use being made of the Indianapolis Sanitary District's interceptor sewer by these Petitioners.

This knowledge transmutes the act of the Town into an arbitrary and capricious deprivation of substantial property without due process of law or just compensation.

Without any special benefits, the Petitioners received absolutely no compensation for the property taken.

## II

## WITHOUT A LAWFUL DETERMINATION OF SPECIAL BENEFITS TO THE PETITIONERS' LAND, THE RESPONDENT TOWN COULD NOT LAWFULLY MAKE ANY ASSESSMENT UPON THEIR LAND

Without a determination of special benefits, a special assessment is the taking of private property without just compensation and, therefore, violates the requirement for due process of law. *Norwood v. Baker* (1898) 172 U.S. 269.

Admittedly, the Town Board made no determination of benefits to the Petitioners' tract. A member of the Town Board responded to the following question with this answer

"Q. You made no determination as to benefits?

"A. That is right."

There was no contrary testimony.

As stated in *Norwood v. Baker,* supra, a special assessment is illegal if it rests upon a basis that excludes any consideration of benefits. That decision still stands.

As the testimony of the case points out, the Petitioners' contention that their tract would receive no benefit from the Town sewer was undisputed. Every witness on the

issue of benefits either testified that they were not considered or that they would not accrue to the Petitioners' land.

Hence, with no benefits determined and no benefits accruing, the case falls squarely within the rule of *Norwood v. Baker,* supra.

## III

## FROM THE OUTSET OF THE MATTER, THE ACTS OF THE LOCAL AND STATE AUTHORITIES WERE ARBITRARY AND CONSTITUTED A DENIAL OF DUE PROCESS OF LAW IN VIOLATION OF THE PETITIONERS' CONSTITUTIONAL RIGHTS

As this Court has frequently declared, it will interfere with an assessment on the ground of violation of constitutional rights secured by the 14th Amendment, when the action of the state authorities is found to be arbitrary or wholly unequal in operation and effect. *Goldsmith v. Pendergast Constr. Co.* (1920) 252 U.S. 427.

The instant case presents a consistent pattern of arbitrary conduct and action starting with the Town Board and running through all the Courts which considered the matter.

After illegally imposing upon the Petitioners' tract an assessment later adjudicated to be null and void, the Board gave the Petitioners on January 20, 1970 their first and only hearing, to which no other citizen was admitted; heard the reading of the remonstrance and the advice of its counsel on the three choices available—to rescind, to modify, or to confirm—and then rubber-stamped its prior

illegal assessment without even discussing the matter before voting.

When the Town at its special meeting on January 20, 1970, gave the Petitioners a so-called hearing, the Town sewer was an accomplished fact. Perhaps this accounts for the perfunctory gesture of compliance with the statute by according the January 20, 1970 hearing. But whatever characterization that meeting merits, there is nothing in the record to indicate a *lawful* determination of whether the *land of the Petitioners* should have been excluded from the sewer district nor does the record show any determination of benefits to their land.

Every Court which considered this case refused all of the testimony on benefits, all of which established that benefits to the Petitioners' land either were not considered or would not accrue. For these Courts to shut their eyes to all the testimony on the crucial issue was indeed a most arbitrary act.

Not only did the Courts act arbitrarily to the great prejudice of the Petitioners, they also closed their eyes to the fact that the action of the Town Board and the sustaining Courts resulted in a wholly unequal operation and effect of the Town's assessment scheme upon the Petitioners. For, as the Statement Of The Case explains, only a small minority of the land owners within the Town were served by the pre-existing sewer; whereas all other property owners had no sewer. Consequently, imposing the same assessment formula upon the Petitioners which was imposed upon the majority of property owners, who had no sewer service, was most oppressive.

The Court of Appeals acted arbitrarily in upholding the lower Court in its own arbitrary findings and conclu-

sions and thus compounded the denial of due process of law in which the Petitioners have suffered.

The Supreme Court of Indiana, in denying the Petition To Transfer, without opinion, forged the last link in the chain of unconstitutional state acts—the denial of due process, the taking of property without compensation, and the pressing upon the Petitioners of an unequal operation and effect of the assessment ordinance.

## CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued to review the judgment of the Supreme Court of Indiana.

Respectfully submitted,

ROBERT W. GEDDES
HAROLD W. JONES

SMITH and JONES
2470 Indiana National Bank Tower
Indianapolis, Indiana 46204

*Counsel for Petitioners*